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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KIMBERLEY MAIN, an individual, on behalf of herself and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC., a Delaware corporation, and DOES 1 through 50 inclusive Defendants.	Consolidated Case No. C 11-01919 JSW Consolidated with: Case No. C 11-02001 JSW Case No. C 11-02893 JSW Case No. C 11-02659 JSW **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** Date: May 24, 2013 Time: 9:00 a.m. Ctrm.: 11, 19th Floor Judge: Hon. Jeffrey S. White

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Federal Cases

Pursuant to Federal Rule of Civil Procedure 23(e), Plaintiff respectfully submits this memorandum of points and authorities in support of their Motion for Final Approval of Class Action Settlement.

I. BACKGROUND

A. The Alleged Violation and Litigation

Plaintiffs contend that Defendant Wal-Mart Stores, Inc. ("Defendant" or "Wal-Mart") violated California Civil Code section 1747.08 ("Section 1747.08") by requesting and recording personal identification information from customers in conjunction with credit card transactions in its California retail stores. Wal-Mart denies all claims of wrongdoing and asserts several affirmative defenses on the grounds that it did not violate the Song-Beverly Credit Card Act or any other laws relating to its alleged conduct.

B. The Main Action

On or about March 9, 2011, Plaintiff Kimberley Main filed a class action complaint in the San Francisco County Superior Court entitled *Kimberley Main, individually, and on behalf of all others similarly situated, v. Wal-Mart Stores, Inc., et al.*, Case No. CGC-11-509011, in which she alleged claims on her own behalf and on behalf of all others similarly situated for violations of California's Song-Beverly Credit Card Act, Civil Code section 1747.08 (the "Main Action").

On April 20, 2011, Wal-Mart removed the Main Action, and on April 28, 2011, the Main Action was reassigned to the Honorable Jeffrey S. White, District Judge for the United States District Court for the Northern District of California, for all further proceedings and designated as Case No. 3:11-cv-01919-JSW.

C. The Nelson Action

On or about March 4, 2011, Plaintiff Robin Nelson filed a class action complaint in the San Francisco County Superior Court entitled *Robin Nelson, individually and on behalf of all others similarly situated, v. Wal-Mart Stores, Inc.*, Case No. CGC-11-508950, in which she alleged claims on her own behalf and on behalf of all others similarly situated violations of California's Song-Beverly Credit Card Act, Civil Code section 1747.08 (the "Nelson Action"). On April 25, 2011, Wal-Mart removed the Nelson Action, and on May 16, 2011, the Nelson

Action was ordered related to the Main Action and reassigned to the Honorable Jeffrey S. White for all further proceedings.

D. The Grikavicius Action

On or about February 14, 2011, Plaintiff Marylynn Grikavicius filed a class action complaint in the San Francisco County Superior Court entitled *Marylynn Grikavicius, an individual, on behalf of herself and all others similarly situated, v. Wal-Mart Stores, Inc., et al., inclusive*, Case No. BC454993, in which she alleged claims on her own behalf and on behalf of all others similarly situated for violations of California's Song-Beverly Credit Card Act, Civil Code section 1747.08 (the "Grikavicius Action"). On March 18, 2011, Wal-Mart removed the Grikavicius Action, and on July 20, 2011, the Grikavicius Action was ordered related to the Main Action and reassigned to the Honorable Jeffrey S. White for all further proceedings.

E. The Landeros Action

On or about February 24, 2011, Plaintiff Lourdes Landeros filed a class action complaint in the United States District Court for the Central District of California, Case No. 2:11-01635-JSL-PJWx entitled *Lourdes R. Landeros, an individual, on behalf of all others similarly situated, v. Wal-Mart Stores, Inc., et al.*, in which she alleged claims on her own behalf and on behalf of all others similarly situated violations of California's Song-Beverly Credit Card Act, Civil Code section 1747.08 (the "Landeros Action"). On June 20, 2011, the Landeros Action was ordered related to the Main Action and reassigned to the Honorable Jeffrey S. White for all further proceedings.

F. Court's Order Consolidating the Main, Nelson, Grikavicius and Landeros Actions

On November 28, 2011, the Honorable Jeffrey S. White entered an order consolidating the Main Action, Nelson Action, Landeros Action and Grikavicius Action for all purposes as *Kimberley Main v. Wal-Mart Stores, Inc., et al.*, Case No. 3:11-cv-01919-JSW (the "Consolidated Action"). [Doc. No. 40]. On December 8, 2011, Plaintiffs Kimberley Main, Robin Nelson, Marylynn Grikavicius and Lourdes Landeros filed a Consolidated Complaint in the Consolidated Action alleging Wal-Mart violated the Song-Beverly Credit Card Act of 1971, Cal.

Civ. Code § 1747.08, *et seq*. Plaintiffs Main, Nelson, Grikavicius and Landeros sought redress on their own behalf and on behalf of other similarly situation consumers in California as a class action. On December 27, 2011, Wal-Mart filed its Answer to the Consolidated Complaint.

G. The Heon Action

On April 4, 2012, Plaintiff Tiffany Heon filed a putative class action complaint against Wal-Mart in the United States District Court for the Northern District of California, entitled *Tiffany Heon v. Wal-Mart Stores, Inc., et al.*, Case No. 3:12-cv-01681-MEJ, alleging Wal-Mart violated the Song-Beverly Credit Card Act of 1971, Cal. Civ. Code § 1747.08, *et seq*. (the "Heon Action"). On July 27, 2012, the Heon Action was ordered related to the Consolidated Action and reassigned to the Honorable Jeffrey S. White for all further proceedings.

H. Settlement Negotiations and Mediation

On April 16, 2012, after exchanging substantial formal discovery as to the scope of the Class, the number of transactions at issue, and the merits of the claims, the Parties participated in an all-day mediation session before Hon. Edward A. Infante (Ret.) of JAMS, an experienced mediator. Declaration of Gene J. Stonebarger in Support of Final Approval of Class Action Settlement ("Stonebarger Decl.") at ¶3. With the assistance of Hon. Edward A. Infante, a settlement was reached as to all material terms on Class benefits and Notice. *Id.* After the April 16, 2012 mediation session, a final settlement (the "Settlement Agreement") was reached. *Id.* On November 9, 2012, the Parties fully executed the Settlement Agreement, and on January 22, 2013, this Court Preliminarily Approved the Settlement Agreement. *Id.* In its Order, the Court approved the proposed settlement and the form of Class Notice, and directed Wal-Mart to provide Notice to the members of the Class.

II. THE PROPOSED SETTLEMENT

A. Class Benefits

Class members have been presented with the opportunity to submit a claim for a gift card. The Settlement Administrator received 519 timely claims. Declaration of Charlene Young ("Young Decl."), ¶10. Of the 519 timely claims, 206 listed a transaction that occurred while Wal-Mart actively conducted its ZIP Code Survey. *Id.* at ¶11. Wal-Mart intends to provide all

claimants that submitted a timely claim with a $25 gift card, regardless of eligibility. Thus, the 519 individuals who timely submitted a claim will receive a $25 gift card within sixty (60) days after the Effective Date as provided in the Settlement Agreement, if final judicial approval is granted. The gift cards will be freely transferable standard Wal-Mart gift cards with standard terms, including no expiration date; no fees or charges; redeemable for merchandise only, except where required otherwise by law; and redeemable at any Wal-Mart store.

Because the aggregate value of the claimants' benefit ($12,975.00[1]) is less than the minimum class benefit ($750,000.00) Wal-Mart agreed to pay, Wal-Mart will make *cy pres* donations. A *cy pres* donation is routinely "[u]sed in lieu of direct distribution of damages to silent class members..." *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012). "[A] *cy pres* award must qualify as 'the next best distribution' to giving the funds directly to class members." *Id.* Pursuant to the Settlement Agreement, Wal-Mart will make *cy pres* donations in the amount of $737,025.00[2]: $368,512.50 to the Consumer Federation of California and $368,512.50 to the Privacy Rights Clearinghouse.

The settlement provides monetary benefits to Class members in gift cards and *cy pres* donations valued at $750,000.00.

B. *Cy Pres* Beneficiaries

As stated above, Wal-Mart will make *cy pres* donations to the Consumer Federation of California and the Privacy Rights Clearinghouse, which are appropriate beneficiaries.

Under Ninth Circuit precedent, there should be a "driving nexus between the plaintiff class and the *cy pres* beneficiaries." *Dennis*, 697 F.3d at 865. In determining whether a *cy pres* beneficiary is appropriate the Court is "guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members," *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011), and must not benefit a group "too remote from the plaintiff class." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990); *see also Nachshin*, 663 F.3d at 1040 (the *cy pres* distribution should "target the plaintiff class...").

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[1] $25 gift card x 519 Claims = $12,975.00.

[2] $750,000 (Minimum Class Benefit) - $12,975 (Claimed Benefit) = $737,025.00.

At its core, the instant case is focused on protecting the privacy rights of California consumers by enforcing California Civil Code Section 1747.08 which seeks to protect the individual privacy of consumers by prohibiting merchants from collecting customer personal identification information during credit card purchase transactions; and, by providing consumers a remedy when the statute is violated. The objectives of the statute and the interests of absent class members are co-extensive with one another.

The protection of consumer privacy is at the very heart of the Consumer Federation of California and the Privacy Rights Clearinghouse. For instance, the Consumer Federation of California is a non-profit advocacy organization that devotes its resources to "campaign[ing] for state and federal laws that place consumer protection ahead of corporate profit" which includes laws aimed at "protecting consumer financial privacy." Stonebarger Decl. at Exh. 'A'. Likewise, the Privacy Rights Clearinghouse is a California nonprofit corporation, which, among others, identifies its goals as being: (i) to raise consumers' awareness of how technology affects personal privacy; (ii) empower consumers to take action to control their own personal information by providing practical tips on privacy protection; and (iii) respond to specific privacy-related complaints from consumers, and when appropriate, intercede on their behalf and/or refer them to the proper organizations for further assistance. *See id.* at Exh. 'B'. Thus, the Consumer Federation of California and the Privacy Rights Clearinghouse are appropriate *cy pres* beneficiaries.

C. Notice of the Settlement to Class Members

Rule 23(e)(1) of the Federal Rules of Civil Procedure requires class members to receive notice of a settlement "in a reasonable manner." Class members need not receive "actual notice." *Silber v. Mabon*, 18 F.3d 1449, 1453-54 (9th Cir. 1994). Instead, notice may be provided in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In compliance with the Court's Preliminary Approval Order dated January 22, 2013 [Doc. No. 70], Wal-Mart provided notice to the Class in three ways: In-Store Notice, Notice by

Publication, and Website Notice. The Class Notice ("Notice") described, inter alia, the claims in the lawsuit, the terms of the Settlement, and the procedures for objecting to the Settlement and for electing to be excluded from the Class and the Settlement. The Notice also informed Class members that they are permitted to appear at the Fairness Hearing on May 24, 2013, either with or without counsel. Wal-Mart provided Class Members with sufficient notice of the Settlement.

1. In-Store Notice

From March 14, 2013 through April 29, 2013, Wal-Mart conspicuously displayed the tear-away notices (Exhibit '2' to Young Decl.), in pads of 300, at the customer service desk of every Wal-Mart store located in California. *See* Declaration of Erica Mooring ("Mooring Decl.") at ¶¶2, 6, 17; Young Decl. at ¶5.

2. Notice by Publication

On February 14, 2013, and once a week thereafter for two more consecutive weeks, the Settlement Administrator arranged to have the Short-Form Notice (Exhibit '1' to Young Decl.) published in the Los Angeles and San Francisco regional print markets of USA Today. *See* Young Decl. at ¶4.

3. Website Notice

On January 25, 2013, the Settlement Administrator established a settlement website, located at www.WalMartClassActionSettlement.com (the "Settlement Website"), which contains information relating to the settlement, including the Detailed Notice, Claim Form, and Preliminary Approval Order. Young Decl. at ¶2. The Settlement Website has and will remain live through the Effective Date as provided in the Settlement Agreement. *Id.* at ¶3.

D. Objections to and Exclusions from the Settlement

Pursuant to the Court's Preliminary Approval Order, Class Members were required to file and postmark objections to the proposed settlement on or before April 29, 2013 [Doc. No. 72]. Similarly, Class Members were required to mail a letter electing to exclude themselves from the Class on or before April 29, 2013. *Id.* There have been no objections and only three (3) requests to be excluded. Stonebarger Decl. at ¶7; Young Decl. at ¶13.

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E. Payments to Named Plaintiffs Not Serving as Class Representatives

In consideration for the General Release of the named Plaintiffs Kimberley Main, Marylynn Grikavicius, and Lourdes Landeros, Wal-Mart agrees to pay each one thousand dollars ($1,000) to resolve their individual claims.

F. Attorneys' Fees, Costs and Incentive Fee Awards

The Preliminary Approval Order appointed Plaintiffs Robin Nelson and Tiffany Heon as the Class representatives, and the law firms of Stonebarger Law, APC, Westrup Klick LLP, Patterson Law Group, APC, and Hoffman Libenson Saunders & Barba (formerly Hoffman & Lazear), and Morris and Associates as Class Counsel.

Plaintiffs filed their Motion for Attorneys' Fees, Costs and Incentive Awards on April 8, 2013, seventy-five (75) days after the entry of the Preliminary Approval Order. Class representatives applied for incentive awards of $3,500 to each of them, and $420,000 to Class Counsel. There have been no objections to the requested awards.

III. ARGUMENT

A. The Court Should Approve the Proposed Settlement Because a Class Exists, and the Proposed Settlement is Fair, Adequate, and Reasonable.

Court approval is required for any settlement agreement that will bind class members. *See* Fed. R. Civ. P. 23(e). Generally, class-settlement approval is a two-step process: (1) the Court evaluates whether a class exists; and (2) the Court determines whether the proposed settlement is fundamentally fair, adequate, and reasonable. *Morales v. Stevco, Inc.*, 2012 U.S. Dist. LEXIS 68640, at *16 (E.D. Cal. 2012) (*citing Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (internal citations omitted)); *see also* Fed. R. Civ. P. 23(e)(2). After a grant of preliminary approval, notice is directed to the class members, and then the Court holds a fairness hearing, where it considers any objections from class members and decides whether to grant final settlement approval. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004) (*citing* Manual for Complex Litigation (Third) § 30.41 at 236-37 (1995)).

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1. A Class Exists, Satisfying the First Prong of the Settlement-Approval Analysis

Class certification for settlement purposes should be granted because all the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3) are satisfied. This Court preliminarily approved the Class defined in the Settlement Agreement. [Doc. No. 70] The Court defined the Class as follows:

> All persons who, between February 14, 2010 and November 30, 2010, used a credit card to make a purchase in a Wal-Mart store located in California while the ZIP Code Survey was active in that store, and whose personal ZIP code was requested and recorded as a result of the ZIP Code Survey.

a. *Numerosity*

The class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Although there is no specific numerical threshold, joining more than one hundred plaintiffs is impracticable." *Morales*, 2012 U.S. Dist. LEXIS 68640, at *18-19 (citing *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 & n.10 (9th Cir. 1982) (finding that the numerosity requirement would have been "satisfied solely on the basis of the [110] ascertained class members" and listing multiple cases in which classes with fewer than 100 members were certified), *vacated on other grounds*, 459 U.S. 810, 103 S. Ct. 35, 74 L. Ed. 2d 48 (1982)). Here, according to Wal-Mart, during the Class Period, hundreds of thousands of credit card transactions occurred in California stores during an active ZIP Code Survey. As such, the numerosity requirement is satisfied.

b. *Commonality*

There are questions of law and fact that are common to the Class. *See* Fed. R. Civ. P. 23(a)(2). Some of the common questions include whether Wal-Mart's policy and practice of requesting and recording customers' ZIP codes during purchase transactions, "ZIP Code Surveys", violate California Civil Code section 1747.08. The common questions "must be of such a nature that [they are] capable of class-wide resolution—which means that determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Here, the common questions go straight to the core of all of the Class Members' claims and answers to the

questions would resolve the suit. Thus, the commonality requirement is met.

c. *Typicality*

The Class representatives' claims are typical of the claims of the Class. *See* Fed. R. Civ. P. 23(a)(3). Typicality is tested by determining "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (*quoting Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). Here, all Class Members allege that, in violation of Section 1747.08, their personal identification information was requested and recorded by Wal-Mart during a credit card transaction. As such, typicality exists.

d. *Adequacy of Representation*

The Class representatives are required to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine adequacy, two questions must be resolved: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (*citing Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)). Here, Class representatives and Class Counsel allege that each Class representative was asked for her personal identification information during a credit card purchase transaction during the Class Period. These allegations are identical, and not antagonistic to, the claims of the Class. Class representatives have been actively involved in the litigation, and they, along with Class Counsel, have acted in the Class members' best interests. Further, as set forth in detail in the declarations of Class Counsel in support of the Motion for Attorneys' Fees, Costs and Incentive Awards, Class Counsel is very experienced in class action litigation, including class actions for violations of Section 1747.08. Representation of the Class is adequate.

e. *Common Questions Predominate*

The final step in certification of this Settlement Class is to decide whether the common questions of law and fact predominate over individual questions, and whether a class action is

superior to other methods of adjudication. *See* Fed. R. Civ. P. 23(b)(3). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (*quoting* 7A Wright & Miller, Federal Practice & Procedure § 1778 (2d ed. 1986)). Here, the common questions go directly to the heart of the case, and the Court's ruling in favor of the Settlement will resolve the claims for all Class Members. It follows that a class action is superior to other available methods of resolution. Individual claims would be for such a small amount of damages that, "[e]ven if efficacious, these claims would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs." *See Hanlon*, 150 F.3d at 1023. The costs of individual litigation "would dwarf potential recovery." *Id.* Thus, a class action will fairly and efficiently adjudicate the controversy.

2. <u>The Proposed Settlement is Fair, Adequate, and Reasonable</u>

In granting final approval of a settlement, the Court determines whether the "settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (*quoting Hanlon*, 150 F.3d at 1027). To reach this determination, the Court must balance several factors that may include one or more of the following: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998); *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (holding that only one factor was necessary to demonstrate that the district court was acting within its discretion in approving the settlement). Here, each relevant factor supports the conclusion that the Settlement is fundamentally fair, adequate, and reasonable, and should be approved.

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It is generally held that "the fact that the settlement agreement was reached in arm's length negotiations after relevant discovery [has] taken place create[s] a presumption that the agreement is fair." *Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at *5 (N.D. Cal. 1997), *aff'd,* 151 F.3d 1234 (9th Cir. 1998) (citing *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981)). In this context "[i]t cannot be overemphasized that neither the trial court in approving the settlement nor [an appellate court] in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute. It is well settled that in the judicial consideration of proposed settlements, 'the [trial] judge does not try out or attempt to decide the merits of the controversy,' [citation] and the appellate court 'need not and should not reach any dispositive conclusions on the admittedly unsettled legal issue.'" *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 456 (2nd Cir. 1974).

a. *The strength of Plaintiffs' case and the risk, expense, complexity, and likely duration of further litigation*

The core of Plaintiffs' claim is that Wal-Mart violated Section 1747.08 by requesting and recording Class Members' personal identification information in conjunction with credit card transactions. Plaintiffs believe they have the evidence needed to establish a case against Wal-Mart. While Plaintiffs and Class Counsel contend their claims are meritorious, Wal-Mart has raised, and would continue to raise, challenges to the legal and factual bases for such claims. For example, Plaintiffs contend that "requesting and recording a cardholder's [personal identification information, ***without more***," violates Section 1747.08, and that a retailer cannot request personal identification information from a credit card customer "even if the consumer's response was voluntary and made only for marketing purposes." *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524, 527 (2011); *Florez v. Linens 'N Things*, 108 Cal.App.4th 447, 453 (2003).

Wal-Mart denies any wrongdoing in this case. Wal-Mart contends: (1) the class claims concern a survey conducted in some California Wal-Mart stores in 2010, for limited periods of time as to each store, in which customers at checkout, regardless of tender type, were prompted by a display on the debit/credit card keypad terminal to enter a ZIP code; (2) in the case of credit

card customers, the prompt was displayed only after the credit card transaction had been authorized and the customer provided his or her signature completing the transaction; (3) the survey did not require an actual ZIP code, could be bypassed, and therefore was voluntary; and (4) information collected in the survey has not been used, nor could it be used, to personally identify a customer. Based on these contentions, Wal-Mart maintains that there is no liability under section 1747.08 and that it would have a number of meritorious arguments in opposition to class certification if the case proceeded to that stage. Stonebarger Decl. at ¶4.

The uncertainty as to whether consumers' voluntariness constitutes an affirmative defense creates substantial risk for both sides. *Id.* at ¶5. Plaintiffs and their counsel recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the litigation against Wal-Mart through trial and through appeals. *Id.* Plaintiffs and their counsel also have taken into account the uncertain outcome and the risk of any litigation, especially in complex actions such as this Class Action, as well as the difficulties and delays inherent in such litigation. *Id.* This litigation involves complex class action issues, which would involve protracted risky litigation if not settled. *Id.*

"It is simply 'not appropriate for the court to attempt to settle these questions of law and fact:...[T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor [the appellate court] is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, *for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements*.'" *In re Immune Response Secs. Litig.*, 497 F. Supp. 2d 1166, 1172 (S.D. Cal. 2007) (internal citations omitted).

Notwithstanding, "the merits of the underlying class claims are not a basis for upsetting the settlement of a class action; the ***operative word is 'settlement.'***" *7-Eleven Owners for Fair Franchising vs. Southland Corporation,* 85 Cal. App. 4th 1135, 1150 (2000) (emphasis added). Even "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *City of Detroit*, 495 F.2d at 455. Courts have aptly held that "it is the

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very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Linney*, 151 F.3d at 1242 (italics omitted).

Pursuant to California Civil Code section 1747.08(e), a violator of the statute shall be liable for a civil penalty of up to $250.00 for the first violation and up to $1,000.00 for each subsequent violation of the statute, to be paid to the cardholder. Cal. Civ. Code § 1747.08(e). Because of the broad range of civil penalties that could be awarded by the Court after a trial in this case if Wal-Mart is found to have violated the statute, substantial risk exists for both sides.

The Settlement Agreement provides certainty and benefits to Plaintiffs and the Class now, while resolution of the litigation and all appeals may take years and would provide no guarantee of benefits. The advantages of settlement outweigh the costs, risks, and potential for delay, and the Settlement exemplifies an arms-length compromise that is fair and desirable to the class. *See* 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:50 at 155 (4th ed. 2002) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.").

b. *The amount or type of relief offered in Settlement*

Given the strength of Plaintiffs' case and the risk, expense, complexity and duration of further litigation, the amount and terms of the proposed monetary benefits are extremely advantageous. Wal-Mart will provide 519 individuals who submitted a timely claim with $25 gift cards and make *cy pres* donations in the amount of $737,025.00. The settlement provides monetary benefits to Class members in gift cards and *cy pres* donations valued at $750,000.00.

c. *The stage of litigation*

The Parties have engaged in formal discovery, allowing Class Counsel and counsel for Wal-Mart to sufficiently evaluate their positions' strengths and weaknesses, and the probable expense of taking this case to trial. In any event, it is not the law that no class action can be settled until the last particle of discovery has been completed and analyzed. "[I]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where

the parties had sufficient information to make an informed decision about settlement... . [N]otwithstanding the status of discovery, Plaintiffs' negotiators had access to a plethora of information regarding the facts of their case.'" *Linney*, 151 F.3d at 1239-1240 (internal citations omitted); *see also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) ("It is true that very little formal discovery was conducted and that there is no voluminous record in the case. However, the lack of such does not compel the conclusion that insufficient discovery was conducted.") (Emphasis omitted.)). Where, as here, a "plethora of information regarding the facts of [the] case" was available, the settlement should be approved.

d. *The experience and views of Class Counsel*

Class Counsel is very experienced in consumer class actions. Attorneys at Stonebarger Law, APC, Westrup Klick LLP, Patterson Law Group, APC, Hoffman Libenson Saunders & Barba and Morris & Associates have represented millions of consumers in numerous consumer class actions asserting violations of California's consumer-protection statutes, including the Song-Beverly Credit Card Act of 1971. *See* [Doc. No. 73-2]; [Doc. No. 73-2]; [Doc. No. 73-4]; [Doc. No. 73-5]; [Doc. No. 73-6]. Plaintiffs' attorneys are well qualified to conduct this litigation and to assess its settlement value. Defense counsel is also very experienced in the prosecution and defense of class-action lawsuits. Based on that experience, the Parties' counsel agree that the proposed settlement is one that is fair and adequate to members of the Class.

e. *The presence of a governmental participant*

There is no governmental entity participating in this matter, but Wal-Mart provided notice of the Settlement to all appropriate state and federal authorities on November 19, 2012, pursuant to CAFA (28 U.S.C. § 1715(b)).

f. *The reaction of the Class Members*

A class action settlement may be presumed fair when there are only a small percentage of objectors. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001). No Class Members have objected to the Settlement, and only three (3) Class members requested to be excluded from the Settlement. Stonebarger Decl. at ¶7; Young Decl. at ¶13. The fact that no objection has been filed weighs in favor of Settlement approval.

g. *Lack of collusion between the Parties*

Proposed class settlements which are "negotiated at arm's length by counsel for the class" are entitled to "an initial presumption of fairness." *See* Newberg on Class Actions Section 11:41 at 90. Here, the proposed settlement is the product of extensive negotiations conducted at arm's-length among counsel and a well-respected mediator. Class Counsel and counsel for Wal-Mart demonstrated that they were fully prepared to litigate this case through final judgment. This litigation has been hotly contested since its inception in March of 2011—there can be no question of any collusion between counsel.

B. The Class Received Adequate Notice of the Settlement.

Class Members must be given reasonable notice of any proposed settlement and the Court should "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *See* Fed. R. Civ. P. 23(c)(2)(B), 23(e)(1). The notice must "clearly and concisely state in plain, easily understood language" the following: (i) the nature of the action; (ii) the Class definition; (iii) the Class claims, issues, or defenses; (iv) that a Class Member may appear through counsel; (v) that Class Members may exclude themselves and how to do so; and (vi) the binding effect of a class judgment on Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B).

Here, the Notice approved by the Court's Preliminary Approval Order complied with all of these requirements. Wal-Mart delivered the court-approved Notices by conspicuously posting the Short-Form Notice at the customer service desk in each of Wal-Mart's California retail stores and by publishing the Short-Form Notice in the San Francisco and Los Angeles edition of USA Today for three consecutive weeks. Mooring Decl. at ¶6; Young Decl. at ¶¶4-5. The Settlement Website was also made available to Class members at WalMartClassActionSettlement.com. Young Decl. at ¶2. Thus, the three forms of Notice fairly and accurately informed the Class members of the terms of the Settlement and provided sufficient opportunity for them to make informed decisions regarding their rights.

IV. CONCLUSION

The parties request that the Court grant final approval to the Settlement Agreement.

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Respectfully Submitted,

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